STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MMK, Minor.

UNPUBLISHED
July 29, 2014

No. 319156
Newaygo Circuit Court
Family Division
LC No. 13-000748-AF

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Respondent, the minor child's putative father,[1] appeals as of right the trial court order terminating his parental rights to the minor child under MCL 710.39(1). We affirm.

I. FACTUAL BACKGROUND

On May 7, 2013, the minor child's aunt and uncle (petitioners) petitioned the trial court for the adoption of the minor child. On May 16, 2013, the minor child's mother moved the trial court for a hearing to identify the minor child's father and to terminate the father's rights. Within her petition, mother indicated her consent to her child's adoption, and identified respondent as the minor child's father.

On June 19, 2013, the trial court held a hearing to identify the minor child's father. Respondent appeared before the trial court and told the court that he believed that he was the minor child's father. Respondent asked the trial court to deny the petition for adoption because he wanted custody of the minor child. Also, respondent requested that the trial court give him the opportunity to visit with the minor child. Mother stipulated to supervised visitation, and the trial court ordered that respondent have visitation with the minor child "at least once a week."

On July 29, 2013, the trial court held an evidentiary hearing to determine whether under MCL 710.39(2) respondent had

> established a custodial relationship with the child or ha[d] provided substantial and regular support or care in accordance with the putative father's ability to

[1] Respondent was a putative father as defined under MCR 3.903(A)(24).

> provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him . . .

As an initial matter, the trial court construed the language of MCL 710.39(2) and held that respondent was required to demonstrate that he provided substantial and regular support or care for mother or the minor child within the 90 days before he was given notice of the hearing. The trial court's holding indicated that it intended to determine the applicability of MCL 710.39(2) based on respondent's actions during the 90 days before respondent received notice.

After hearing evidence regarding respondent's efforts to provide mother and the minor child with support or care, the trial court found that respondent did not have a custodial relationship with the child and did not provide substantial and regular support or care. Therefore, this case was not governed by MCL 710.39(2), but rather by MCL 710.39(1). MCL 710.39(1) states that when MCL 710.39(2) does not apply, the trial court is required to terminate respondent's parental rights to the minor child if it finds that granting respondent custody would not be in the minor child's best interests.

On August 2, 2013, respondent moved the trial court for reconsideration. Respondent argued that under the language of MCL 710.39(2), he should have been allowed to present evidence that he provided substantial and regular support or care *either* "for the mother during pregnancy" *or* "for either mother or child after the child's birth during the 90 days before notice of the hearing was served." Respondent argued that the trial court erred in only considering his actions during the "90 days before notice of the hearing," instead of also considering his efforts during mother's pregnancy.

On October 31, 2013, the trial court held a termination hearing. During the hearing, the trial court addressed respondent's motion for reconsideration. It did not explicitly grant respondent's motion, but noted that respondent would be allowed to present evidence of his efforts during mother's pregnancy during the termination hearing. The trial court found that respondent failed to provide substantial and regular support or care as required for the application of MCL 710.39(2) both during mother's pregnancy with the minor child and during the 90 days before respondent received notice.

Because the trial court again found that MCL 710.39(2) did not apply in this case, it addressed the best interests of the child under MCL 710.39(1), as defined by the 11 best-interest factors found in MCL 710.22(g). In sum, the trial court concluded that seven of the factors weighed against respondent and that four factors were inapplicable. Based on the trial court's best-interest findings, it determined that granting respondent custody would not be in the best interests of the minor child. Accordingly, the trial court terminated respondent's parental rights. Subsequently, mother gave her consent to petitioner's adoption of the minor child and the termination of her parental rights, and the trial court granted petitioners' request regarding the adoption of the minor child.

II. ORDER OF FILIATION

On appeal, respondent argues that the trial court erred in not entering an order of filiation at the June 19, 2013, hearing because respondent indicated that he was the minor child's father. However, this case arose under the Michigan Adoption Code, MCL 710.21 *et seq*. Respondent never filed a paternity action under the Paternity Act, MCL 722.711 *et seq*. MCL 722.717(1) only grants the trial court authority to enter an order of filiation "[i]n an action under this act." And, under MCL 722.714(1), an action under the Paternity Act must be brought in a complaint before the circuit court. Respondent has not shown plain error in regard to this unpreserved issue. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000) (review of an unpreserved issue is for plain error).

Furthermore, respondent argues that the trial court erred in refusing to stay the adoption proceedings during the termination hearing so that he could establish his paternity. MCL 710.25(2), a provision of the Michigan Adoption Code, provides that "[a]n adjournment or continuance of a proceeding under this chapter shall not be granted without a showing of good cause." Because respondent never filed a paternity action and did not ask for an adjournment of the adoption proceedings until the end of the termination hearing, there was not good cause to stay the adoption proceedings in this case. See *In re MKK*, 286 Mich App 546, 562; 781 NW2d 132 (2009) (finding that good cause for adjournment of an adoption proceeding exists where a father files a "paternity action without unreasonable delay, and there is no direct evidence that he filed the action simply to thwart the adoption proceedings . . . "). The trial court did not abuse its discretion in relying on the untimeliness of respondent's motion in denying him an adjournment in this case. *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990) (review is for an abuse of discretion).[2]

III. PARENTING TIME

Respondent also argues on appeal that the one hour of parenting time he received per week was insufficient to satisfy his due process right to a relationship with the minor child and the minor child's right to parenting time with him. He further claims that the trial court violated his mother's due process rights when it barred her from having grandparent time.

Regarding respondent's constitutional rights in this case, "[t]here is no question that parents have a due process liberty interest in caring for their children . . . " *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001). However, "a putative father ordinarily has no rights regarding his biological child . . . until he legally establishes that he is the child's father." *Id*. at 174. Because respondent did not legally establish that he was the minor child's father, he did not have a due process right regarding the minor child in this case. *Id*.

[2] Respondent also argues that "indigence, or employment of a marginal income should not infringe on his constitutional right to be a parent to his child," that his trial counsel was ineffective, and that the termination of his parental rights was unconstitutional under the terms of the Ninth and Tenth Amendments to the United States Constitution. Because respondent does not provide any authority for those arguments, they are abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

Regarding the minor child's rights, in *In re Clausen*, 442 Mich 648, 686; 502 NW2d 649 (1993), the Michigan Supreme Court held that "children, as well as their parents, have a due process liberty interest in their family life." However, neither of those cases addressed a child's rights as they related to a putative father. In *Grimes v Van Hook-Williams*, 302 Mich App 521, 537; 839 NW2d 237 (2013), we recognized that:

> [T]he United States Supreme Court has never determined whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. And even if children do have such a constitutional right, it is almost certainly the right to maintain a filial relationship with their *legal parents*. [Internal quotation marks and citations omitted.]

Respondent provides no authority in support of the proposition that the minor child had a right to parenting time with her putative father. Therefore, this issue is abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

Further, "grandparents do not have a fundamental right to maintain a family relationship with their grandchildren." *Brinkley v Brinkley*, 277 Mich App 23, 35; 742 NW2d 629 (2007). Thus, we conclude that the rights of respondent's mother were not violated by the denial of grandparenting time. *Id*. In so ruling, we note that respondent did not attempt to obtain grandparenting time under MCL 722.27b.

Respondent also argues that the trial court erred under MCL 722.27 when it refused to provide him with more than one hour of parenting time. The Child Custody Act, MCL 722.21 *et seq*., is the exclusive means for pursuing a party's right to parenting time. *Van v Zahorik*, 460 Mich 320, 327-328; 597 NW2d 15 (1999). But, "[a]bsent a determination that a putative father is the natural or biological father of a child, a claim under the Child Custody Act is barred." *Afshar v Zamarron*, 209 Mich App 86, 89; 530 NW2d 490 (1995). Because respondent was a putative father, any claim he had under the Child Custody Act would have been barred. In sum, because respondent's due process arguments are meritless and any claim respondent had under the Child Custody Act was barred, respondent has failed to show plain error regarding parenting time. *Kern*, 240 Mich App at 336.

IV. TERMINATION OF PUTATIVE FATHER'S RIGHTS

Next, respondent argues that during the hearing held on July 29, 2013, the trial court erroneously interpreted MCL 710.39(2) by ruling that it could only consider the 90-day period before respondent received notice in this case in determining whether respondent provided substantial and regular support or care for mother or the minor child. We agree and petitioners concede this point. However, while the trial court improperly construed MCL 710.39(2) during the July 29, 2013, hearing, it subsequently reconsidered the issue and granted respondent the relief he seeks on appeal by allowing him to introduce evidence of his efforts to care for mother during her pregnancy. The trial court then found that respondent failed to provide substantial and regular support or care during mother's pregnancy as required for the application of MCL 710.39(2). Thus, the issue now raised on appeal is moot because respondent has already received from the trial court the remedy he asks us to impose on appeal. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Respondent also argues that the trial court erred in making its best-interest findings on the applicable factors under MCL 710.22(g). We review the trial court's findings of fact, including its findings regarding the best-interest factors and its conclusion regarding the minor child's best interests, for clear error. *In re BKD*, 246 Mich App 212, 215; 631 NW2d 353 (2001). "A finding is clearly erroneous if this Court is left with a definite and firm conviction that the trial court made a mistake." *Id*.

Again, after the trial court determined under MCL 710.39(2) that respondent did not have a custodial relationship with the minor child and had not provided substantial and regular support or care, the trial court was required to apply MCL 710.39(1), which provides that:

> If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

Under MCL 710.22(g), "best interests of the child" is defined as:

> [T]he sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:
>
> (*i*) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under [MCL 710.39], the putative father and the adoptee.
>
> (*ii*) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.
>
> (*iii*) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (*iv*) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (*v*) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under [MCL 710.39], the home of the putative father.
>
> (*vi*) The moral fitness of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], of the putative father.

> (*vii*) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], of the putative father, and of the adoptee.
>
> (*viii*) The home, school, and community record of the adoptee.
>
> (*ix*) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.
>
> (*x*) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.
>
> (*xi*) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody.

Under factor (*i*), respondent argues that his one hour of parenting time each week with the minor child created official ties between the minor child and himself. However, while respondent loved the minor child, there was no evidence that the minor child had an emotional tie to respondent. Thus, the trial court did not clearly err in determining that factor (*i*) weighed against a finding that it would be in the minor child's best interests to grant respondent custody.

Under factor (*ii*), respondent notes that the trial court found that he loved the minor child. He argues that this finding tends to prove that he must also have had the capacity and disposition to provide the minor child with love. However, based on his past behavior, the trial court found that respondent had "trouble taking care of himself." Instead, it determined this factor based on respondent's capacity to provide the minor child with guidance and education. The trial court did not clearly err in determining that factor (*ii*) weighed against a finding that it would be in the minor child's best interests to grant respondent custody.

Under factor (*iii*), respondent argues that the trial court erred in finding that the factor weighed against him based on respondent's struggles with caring for himself. However, the evidence supported the trial court's finding that respondent had trouble caring for himself and it did not clearly err in determining that factor (*iii*) weighed against a finding that it would be in the minor child's best interests to grant respondent custody.

Under factor (*v*), respondent argues that there was evidence that his family unit was permanent. However, at the time of the termination hearing, respondent lived in his mother's home with two of his brothers, his mother, and his mother's boyfriend. Also, respondent testified at the hearing that he was considering moving out of his mother's house. Therefore, the trial court's finding that respondent's family unit lacked permanence was not clearly erroneous, and the trial court did not clearly err in determining that factor (*v*) weighed against a finding that it would be in the minor child's best interests to grant respondent custody.

Under factor (*vi*), respondent argues that he was morally fit because he made arrangements for the arrival of the minor child and took steps to form a relationship with the minor child, even without taking a DNA test to confirm his paternity. However, that argument does not negate respondent's own admission that he used marijuana within the six months before

the termination hearing. The trial court chose to rely on that admission in finding that respondent lacked moral fitness. The trial court did not clearly err in determining that factor (*vi*) weighed against a finding that it would be in the minor child's best interests to grant respondent custody.

Under factor (*vii*), in regard to his mental and physical health, respondent merely notes on appeal that he "testified that he has ADHD, and Chronic Idiopathic Urticaria, [but that] both conditions are clearly treatable." However, respondent held approximately six different jobs during 2012 and 2013 and still lived with his mother. Respondent did not have a driver's license at the time of the hearing. Respondent dropped out of high school after he completed the ninth grade, and subsequently dropped out of college after he earned his GED. Also, respondent specifically lied to the trial court during the termination hearing when he testified that the minor child was enrolled in health insurance through his employment. In reality, respondent's employment that would have provided insurance had been terminated prior to his testimony. His struggles with education, struggles with keeping a job, struggles with marijuana, and attempt to pass off a blatant lie as the truth while under oath all suggested that respondent's mental health was questionable. The trial court did not clearly err in finding that factor (*vii*) weighed against a finding that it would be in the minor child's best interests to grant respondent custody.

In regard to factor (*xi*) (any other factor considered by the court to be relevant to a putative father's request for child custody), respondent does not challenge the trial court's actual findings under that factor. Instead, respondent argues that the trial court's finding under factor (*xi*) was erroneous because the trial court was not honest about its consideration of other factors, including the trial court's belief that respondent should have married the minor child's mother, its disapproval of the fact that respondent wanted custody of the minor child, and the trial court's relationship with petitioners. However, the record does not support that the trial court personally believed that respondent should have married the minor child's mother. Rather, the trial court's statements regarding marriage in this case were made in the context of the trial court's attempts to inform respondent that the current state of Michigan law was disfavorable to him as a putative father. Additionally, the record does not show that the trial court improperly considered any possible disappointment in respondent's decision to seek custody of the minor child when it addressed the minor child's best interests. Also, there was no evidence that the trial court had a relationship with petitioners. The trial court did not clearly err in finding that factor (*xi*) weighed against a finding that it would be in the minor child's best interests to grant respondent custody.[3]

Accordingly, the trial court's determination that seven factors weighed against a finding that it would be in the minor child's best interests to grant respondent custody and that four factors were irrelevant to this case were either not clearly erroneous or are unchallenged by respondent on appeal. The trial court did not clearly err in concluding that it would not be in the best interests of the minor child to grant respondent custody. *BKD*, 246 Mich App at 215 (the trial court's conclusion regarding the minor child's best interests is reviewed for clear error).

[3] The trial court found that the remaining four best-interest factors were inapplicable to this case. Respondent does not challenge those findings on appeal.

Because it was not in the best interests of the minor child to grant respondent custody, the trial court properly terminated respondent's parental rights under MCL 710.39(1).

At oral argument, the putative father asserted that the trial court made inappropriate remarks. Because he was concerned about his treatment, this Court has taken pains to read the transcript in its entirety. While it is true that some individual remarks give the impression of being inappropriate when taken out of context, they convey a different impression when read in their entirety. When reading the entire exchange as a whole, it becomes clear that the trial court was attempting to explain to the putative father, who had no counsel present, the legal significance of the situation in which he found himself at that time. Therefore, this Court declines to consider these individual remarks outside of their proper context.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck